

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. COTTON,

Plaintiff,

v.

COUNTY OF SAN BERNARDINO,  
et al.,

Defendant.

NO. EDCV 15-2314-VAP (AGR)

ORDER ACCEPTING FINDINGS AND  
RECOMMENDATIONS OF UNITED  
STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the complaint, records on file, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a *de novo* review of those portions of the Report to which Plaintiff has objected. The Court accepts the findings and recommendation of the Magistrate Judge except as described below.

Plaintiff was acquitted of domestic violence in violation of Cal. Penal Code § 273.5 in *People v. Cotton*, Case No. FVI 1401155 (County of San Bernardino). At trial, the prosecutor, Mr. Haskell, stated he “found out this morning” that the victim, Plaintiff’s wife, had stated she bit Plaintiff’s lip and informed Mr. Mathias, Plaintiff’s defense counsel. (Pl. Req. Jud. Notice, Exh. B at 20, Dkt. No. 35.)<sup>1</sup> Matthias requested, and the trial judge gave, a jury instruction on late discovery. (*Id.* at 19, 23-

<sup>1</sup> Page citations are to the page numbers assigned by CM/ECF in the header.

24) (“[An] attorney for the People failed to disclose a statement by Rosalyn Cotton that she had bitten the defendant’s lip.”)

The First Amended Complaint (“FAC”) alleges that prosecutors did not turn over “*Brady* evidence” that “was available at or before the preliminary hearing.” (FAC ¶ 35.) Plaintiff alleges that he was in custody 47 days from March 29, 2014 until May 21, 2014, when he posted bond. (FAC ¶ 54.)

In his Objections, Plaintiff explicitly states that his wife made the statement to prosecutor Levers “before the Preliminary Hearing, and [Levers] never disclosed this evidence at that Hearing.” (Obj. at 1.) Plaintiff argues that he has thereby rebutted the *prima facie* evidence of probable cause from the judge’s decision to hold Plaintiff to answer after his preliminary hearing.

To state a malicious prosecution claim under 42 U.S.C. § 1983, Plaintiff must allege “that the defendants prosecuted [him] with malice and without probable cause, and that they did so for the purpose of denying [him] equal protection or another specific constitutional right.” *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066 (citation omitted).

The decision to hold a criminal defendant to answer after a preliminary hearing constitutes *prima facie* evidence of probable cause. *Awabdy*, 368 F.3d at 1067. “Among the ways that a plaintiff can rebut a *prima facie* finding of probable cause is by showing that the criminal prosecution was induced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith.” *Id.* “[C]ollateral estoppel does not apply when the decision to hold a defendant to answer was made on the basis of fabricated evidence presented at the preliminary hearing or as the result of other wrongful conduct by state or local officials.” *Id.* at 1068.

Even assuming that collateral estoppel does not apply, the question remains whether Plaintiff has sufficiently alleged the absence of probable cause. When the facts are undisputed, the existence of probable cause is a question of law. *Tsao v. Desert Palace*, 698 F.3d 1128, 1146 (9th Cir. 2012). For purposes of the probable

1 cause analysis, the court assumes as true the allegation in the Objections that  
2 Plaintiff's ex-wife told prosecutor Levers, prior to the preliminary hearing, that she bit  
3 Plaintiff. "The mere existence of some evidence that could suggest self-defense  
4 does not negate probable cause. [The criminal defendant]'s claim of self-defense  
5 apparently created doubt in the minds of the jurors, but probable cause can well exist  
6 (and often does) even though ultimately, a jury is not persuaded that there is proof  
7 beyond a reasonable doubt." *Yousefian v. City of Glendale*, 779 F.3d 1010, 1014  
8 (9th Cir. 2015). In California, self defense is not established as a matter of law simply  
9 because the criminal defendant is not the initial aggressor:

10           A person threatened with an attack that justifies the exercise  
11           of the right of self-defense need not retreat. In the exercise  
12           of his right of self-defense a person may stand his ground  
13           and defend himself by the use of all force and means which  
14           would appear to be necessary to a reasonable person in a  
15           similar situation and with similar knowledge; and a person  
16           may pursue his assailant until he has secured himself from  
17           danger if that course likewise appears reasonably  
18           necessary. This law applies even though the assailed  
19           person might more easily have gained safety by flight or by  
20           withdrawing from the scene.

21 CALJIC 5.50; CALCRIM 3470.

22           Defendant Abernathy, the deputy sheriff who was the sole witness at the  
23 preliminary hearing, testified that he interviewed Plaintiff at the hospital. Abernathy  
24 testified that Plaintiff said his wife, during an argument, "stood up from the bed and  
25 tried to bite him near the lip. So in self-defense he shook her several times, and she  
26 consequently hit her head several times on the headboard of the bed." (Pl. Req. Jud.  
27 Not., Exh. A at 11.) Plaintiff's wife could not recall how she got her injuries. She told  
28 Plaintiff she wanted a divorce. "She was sitting on her bed, and next thing she

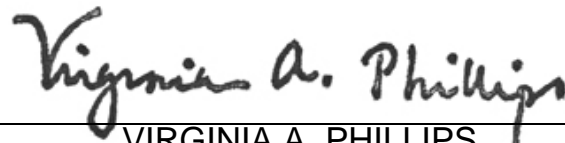
1 remembered is waking up on her bed.” (*Id.* at 9.) Q: “She doesn’t recall whether  
2 she attempted to bite Mr. Cotton before she blacked out or doesn’t remember what  
3 happened?” A: “I asked her. She claimed she did not.” (*Id.* at 12-13.) She told  
4 Abernathy that Plaintiff struck her head on the headboard, but “she only knew this  
5 because Mr. Cotton told her.” (*Id.* at 13.) Plaintiff told her he became frustrated at  
6 her and hit her head against the headboard several times. (*Id.* at 14.) Abernathy  
7 observed that she had a swollen right eye and a lump to the back of her head. (*Id.* at  
8 9-10.) Plaintiff does not allege that Abernathy fabricated or omitted evidence. The  
9 court held Plaintiff to answer on Count 1 of the First Amended Felony Complaint. (*Id.*  
10 at 16.)

11 Taking as true the allegation that Plaintiff’s wife admitted to a prosecutor that  
12 she attacked first by biting Plaintiff, the question remained whether Plaintiff defended  
13 himself by use of force that would appear necessary to a reasonable person in a  
14 similar situation and with similar knowledge. Thus, the prosecutor acknowledged at  
15 the preliminary hearing Plaintiff’s statement that “[s]he tried to bite him,” but argued  
16 that Plaintiff “hit her head repeatedly against the headboard and knocked the victim  
17 unconscious.” (*Id.* at 15.) “Probable cause does not require proof beyond a  
18 reasonable doubt.” *United States v. Noster*, 590 F.3d 624, 629 (9th Cir. 2009).  
19 Probable cause exists when, “under the totality of the circumstances known to the  
20 officer, a prudent person would have concluded that there was a fair probability that  
21 the suspect had committed or was committing a crime.” *Id.* at 629-30. The facts  
22 presented by Abernathy show a fair probability that Plaintiff’s response to the bite  
23 was unreasonable. See *also* Cal. Penal Code § 13701(b) (“The dominant aggressor  
24 is the person determined to be the most significant, rather than the first, aggressor.”).

25 Plaintiff’s remaining objections are without merit.  
26  
27  
28

1 IT IS ORDERED that (1) Defendants' motions to dismiss are granted; (2) the  
2 First Amended Complaint is dismissed without leave to amend; and (3) judgment be  
3 entered dismissing this action with prejudice as to claims one through six and without  
4 prejudice as to claims seven and nine through twelve.

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7 DATED: December 8, 2016

  
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VIRGINIA A. PHILLIPS  
Chief United States District Judge